

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Core Communications, Inc. for	)	
Forbearance under 47 U.S.C. § 160(c) from	)	WC Docket No. 06-100
Rate Regulation Pursuant to § 251(g) and for	)	
Forbearance from the Rate Averaging and	)	
Integration Regulation Pursuant to § 254(g)	)	

**APPLICATION FOR REVIEW**

Core Communications, Inc. (“Core”), pursuant to 47 U.S.C. § 5(c)(7) and 47 C.F.R. § 1.115, hereby submits its Application for Review (“Application”) of the March 1, 2007 Order adopted by the Wireline Competition Bureau (“Bureau” or “WCB”).<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Bureau’s attempt to extend the statutory deadline set forth in section 10 was ineffective. Specifically, the *Extension Order* is invalid because: (1) the WCB Chief lacks the authority to issue such an order; and (2) an extension was not “necessary” within the meaning of section 10(c). The Bureau relied upon the Commission’s recent decision in *Fones4All*,<sup>2</sup> where the Commission found that the WCB Chief acted properly to extend the deadline because the Commission found that extensions of time, in general, are “routine and well-adjudicated” matters and, therefore, within the authority delegated to the Chief. The *Extension Order*, however: (i)

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<sup>1</sup> See Order, WC Docket No. 06-100, DA 07-927 (rel. Mar. 1, 2007) (“*Extension Order*”).

<sup>2</sup> *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd. 11125, 11128 n. 17 (2006), petition for review pending in *Fones4All Corp. v. FCC*, No. 06-75388 (9th Cir.) (“*Fones4All Forbearance Order*”).

conflicts with Congress' directives in section 10(a) of the Act and (ii) involves application of Commission precedent that should be overturned or revised. 47 C.F.R. §§ 1.115(a)(i)-(ii).

In violation of the Congressionally-mandated standards set forth in 47 U.S.C. § 160(c), the Bureau improperly acted on "delegated authority"<sup>3</sup> to extend by 90 days the date by which the Commission's failure to act will cause Core's Petition for Forbearance to be deemed granted. The *Extension Order* contradicts the plain language of the statute, applies no discernable principle, and offers no analysis. As a result, the *Extension Order* fails to satisfy the statute. Accordingly, the Commission should grant this Application for Review, and rule on the merits of Core's forbearance petition prior to the expiration of section 10's one year statutory deadline. In the alternative, to the extent the Commission determines a 90-day extension is "necessary" within the meaning of section 10(c), it should issue an order explaining such a decision prior to the expiration of Congress' one-year deadline – April 27, 2007.

Congress has specifically provided that "the Commission" may extend the self-executing remedy *only* when it is "necessary to meet the requirements of" section 10(a). However, the Commission (in the *Fones4All Forbearance Order* and otherwise) has never established any guidance or precedent regarding when a 90-day extension is *necessary* for the purposes of satisfying section 10(c), and the FCC's rules specifically prohibit the WCB Chief from acting in uncharted territory. Therefore, the WCB Chief exceeded his delegated authority in delaying the date on which Core's Petition would be deemed granted by operation of law because he was not acting in reliance on prior precedent or guidelines. But even though it is true that the WCB Chief impermissibly extends the deadline provided by Congress on a routine basis,

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<sup>3</sup> The *Extension Order* claims that extensions of time for forbearance petitions "fall within the authority delegated to the Wireline Competition Bureau (Bureau) pursuant to section 0.91(m) of the Commissions rules." *Extension Order* at ¶ 3 (citing 47 C.F.R. § 0.91(m)).

that fact alone cannot and does not satisfy section 10's directive that extensions be granted *only* when "necessary to meet the requirements of" section 10(a). To the contrary, reducing the statute's "necessary" standard to "expedient" or "routine" also violates section 10.

## II. QUESTION PRESENTED

Whether the Bureau's *Extension Order*, issued pursuant to a claim of delegated authority and purportedly extending the twelve month statutory deadline established in section 10(c) for action on the Petition filed by Core, is invalid and ineffective because it: (i) exceeded the bounds of the Bureau's delegated authority; or (ii) was not "necessary to meet the requirements of Subsection (a)" and therefore invalid and ineffective.

## III. ARGUMENT

### A. The WCB Chief Exceeded His Delegated Authority When He Granted a 90-Day Extension of the Section 10 One-Year Deadline

In the *Extension Order*, the WCB Chief purported to exercise "authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291" to extend the time period by which the Commission was statutorily required to act upon Core's *Forbearance Petition*.<sup>4</sup> The *Extension Order* stated without analysis that "a 90-day extension [was] warranted under section 10(c)" because Core's Petition raised "significant questions."<sup>5</sup> In extending the statutory deadline, the WCB Chief exceeded the very authority upon which he purported to rely.

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<sup>4</sup> *Extension Order* at 5.

<sup>5</sup> *Id.*, ¶ 4.

Pursuant to 47 U.S.C. section 155,<sup>6</sup> the Commission has delegated to the Chief of the Wireline Competition Bureau the “authority to perform all functions of the Bureau, described in § 0.91,” subject to certain “exceptions and limitations.” 47 C.F.R. § 0.291. Here, the operative limitation is found in section 0.291(a)(2) (emphasis added):

The Chief, Wireline Competition Bureau *shall not have authority to act on any applications or requests which present novel questions of fact, law or policy* which cannot be resolved under outstanding precedents and guidelines.

47 C.F.R. § 0.291(a)(2). Therefore, to the extent the WCB Chief expressly recognized and even relied upon the “significant questions” presented by Core’s Petition as justification for granting a 90-day extension, by FCC rule the Bureau Chief did not “have authority to act on” Core’s Petition in any manner whatsoever, unless the issues can “be resolved under outstanding precedent and guidelines.” Such is not the case.

Other than a cursory and conclusory footnote in the *Fones4All Forbearance Order*, the FCC has *never* issued any guidelines regarding when a 90-day extension is

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<sup>6</sup> 47 U.S.C. § 155 provides, in relevant part:

When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions ... to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter ....

47 U.S.C. § 155(c)(1).

“necessary” for purposes of section 10 of the Act.<sup>7</sup> In the *Fones4All Forbearance Order*, the Commission failed to explain the criteria either it or the WCB Chief uses in determining whether it is “necessary” within the meaning of section 10 to extend by 90 days Congress’ strict deadline. Rather, without reference to Congress’ “necessary” standard or providing any analysis at all, the Commission stated merely that extending deadlines is “routine.” *Fones4All Forbearance Order* at n. 17. Commissioner Furchtgott-Roth’s criticism of the Commission’s apparent policy of “routine” extensions under the guise of implicit delegations of authority remains apt:

Section 10 of the Communications Act is very clear: ‘The **Commission** may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is **necessary** to meet the requirements of subsection (a).’ The statute is thus specific that it is the “**Commission**” which must grant any extension and must do so upon a finding that the extension is **necessary** to meet the purposes of section 10(a). I do not believe that the bureau, acting on its own motion and without even prior consultation with the “Commission,” can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the “Commission” that an extension of time is warranted under these particular circumstances.<sup>8</sup>

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<sup>7</sup> In this instance, silence is telling. The Commission has filled the Code of Federal Regulations with thousands of pages of regulations, so it is not for lack of habit that the Commission has not provided the WCB with any such guidance. Indeed, the Commission has issued *only one* regulation relating to section 10 forbearance petitions. See 47 C.F.R. § 1.53 (requiring forbearance petitioners to specifically cite “47 U.S.C. § 160(c)” in a separate pleading; failure to comply results in the petition not being subject to the deadline set forth in section 10).

<sup>8</sup> See Consolidated Separate Statement of Commissioner Harold Furchtgott-Roth, Sixth Memorandum Opinion and Order, *Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, 14 FCC Rcd. 10840, 10856 (1999). In that matter, the Common Carrier Bureau had granted a 90-day extension finding that the forbearance petition of the Independent Telephone & Telecommunications Alliance raised “significant questions” about whether forbearance of certain rules was appropriate under Section 10. See *id.* at n.3. The Commissioner’s comments reflect his understanding that the Bureau lacked the authority to unilaterally extend the statutory deadline.

As a result, the WCB Chief's reliance on the *Fones4All Forbearance Order* cannot salvage the *Extension Order*. In *Fones4All*, shortly after the WCB Chief issued an order extending the time period to deny Fones4All's Petition for Forbearance, Fones4All filed an Application for Review in which it challenged both the authority of the Chief to grant any such extension and the adequacy of its statutorily required finding that an extension was "necessary to meet the requirements of" Section 10(a). Without analysis, the Commission denied Fones4All's Application for Review. To the extent that decision serves as precedent in this proceeding, it should be overturned as suffering fatally from the perils of circular reasoning.

In the *Fones4All Forbearance Order*, the Commission stated that "[e]xtensions of time do not raise 'novel questions of fact, law or policy,' ... and therefore the Bureau is within its discretion to extend by 90 days the date by which a forbearance petition shall be deemed granted on behalf of the Commission." *Fones4All Forbearance Order* at n.17. The Commission claimed further that "the extension of time involves a routine and well-adjudicated procedural question and does not address the substance of the issues raised by the Core Petition or any other novel question." *Id.* As noted above, however, prior to Fones4All's *Application for Review*, the question of when an extension of time is "necessary" to meet the requirements of Section 10(a) had *never* been adjudicated, so the suggestion that the issue is "well-adjudicated" is simply incorrect. Moreover, the *Fones4All Forbearance Order* provides no analysis as to when it may or may not be "necessary" to extend the strict one-year deadline, and reduces Congress' necessary standard to nothing. Indeed, the *Fones4All Forbearance Order* provides no limiting principle for determining whether an extension is "necessary" within the meaning of section 10, and the Commission has never provided one.

The Commission's rules direct the Chief of the WCB not to "act on any application[]" if the application raises a "novel questions of fact, law or policy," not simply to refrain from making those isolated decisions within the application that raise the "novel question." *See* 47 C.F.R. § 0.291. The FCC rule is clear: the WCB Chief cannot "act on any applications" that presents novel questions. Therefore, when the FCC denied Fones4All's Application for Review and ratified the WCB Chief's *ultra vires* order, it unlawfully failed to adhere to its own rules. *See, e.g., Confederated Tribes & Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466, 474 (9<sup>th</sup> Cir. 1984) ("It is a well-known maxim that agencies must comply with their own regulations."). Therefore, the Commission's decision in the *Fones4All Forbearance Order* does not, and cannot, insulate the WCB's decision to extend the statutory deadline on Core's Petition.

In summary, because the WCB Chief acknowledged that the Core Petition presents significant questions, FCC rules clearly provide that he "shall not have the authority to act" on the Petition in any manner whatsoever.

**B      A 90-Day Extension Was Not "Necessary To Meet The Requirements Of Subsection (a)"**

For the section 10 one-year deadline to be extended, Congress requires "the Commission" to "find" that a 90-day extension is "necessary to meet the requirements of subsection (a)" of section 10. *See* 47 U.S.C. § 160(c). No such extension of time was "necessary" here.

The legislative history surrounding Congress' decision to take the unusual step of passing legislation that resulted in petitions for forbearance being "deemed granted" in the absence of timely Commission action is telling here. In introducing the Telecommunications Competition and Deregulation Act, S. 652, Senator Pressler, then chair of the Committee on

Commerce, Science, and Transportation, lambasted the Commission for its repeated failure to take timely action and consequent creation of “regulatory lag.” Telecommunications Competition & Deregulation Act of 1996 (Proceedings and Debate, June 7, 1995) *available in* WESTLAW, Arnold & Porter LLP Legislative History: PL 104-104. He noted that “government and regulators have a rather sorry history of slowing the introduction of new technologies and competition. The examples of this regulatory lag are numerous and all too common.” *Id.* After delineating several examples of FCC delay, Senator Pressler touted forbearance as one solution to the anti-competitive environment nurtured by the Commission. *Id.*

Senator Dole introduced an amendment to S. 652 in order to change the permissive forbearance language of the original draft into something that would, in fact, require timely action by the FCC. As Mr. Dole noted, the original version of S. 652 did not provide a “guarantee that the Commission will ever act on requests that it forbear from regulations.” *Id.* The Dole Amendment required the Commission to act within 90 days, through a written determination, to prevent a petition from being deemed granted and provided for an extension of 60 days if it was necessary to meet the requirements of Section 10(a). *Id.* During conference, the Dole Amendment was accepted, but the time period for Commission action was extended to one year. *See* Telecommunications Act of 1996, House of Representatives Conference Report 104-458, Title IV, Section 401, at 184-85.

With that legislative purpose in mind, it is apparent that Congress’ intent in passing the deadline in section 10 was to force the Commission to make timely determinations on all forbearance petitions if it sought to prevent those petitions from being “deemed granted” by operation of law. Moreover, the only plausible inference from the statutory language and the



legislative history is that Congress did not mean “necessary” to be reduced to “expedient,” for otherwise Congress would have used that term or simply given the Commission 15 months to act on a forbearance petition. It was never the intent of Congress to allow the Commission to routinely take advantage of the 90-day extension provision. However, that is just what the WCB has admittedly done. Treating an extension of the Congressionally-prescribed statutory period as “routine” serves to undermine the express intent of Congress, and renders the requirement that extensions be granted only when “necessary” superfluous. It simply cannot be inferred that Congress intended to insert superfluous or unnecessary language in its drafting. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute, we are obliged to give effect, if possible, to every word Congress used.”).

Moreover, courts have repeatedly found that the Commission uses an impermissibly broad interpretation of the word “necessary” so as to render it meaningless. *See, e.g., GTE Servs. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) (“a statutory reference to ‘necessary’ must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit ‘necessary’ to that which is required to achieve a desired goal.”) (*citing AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)). In *GTE Services*, the D.C. Circuit found that the FCC was attempting to use an “interpretation of ‘necessary’” that was “impermissibly broad” and that its interpretation diverged “from any realistic meaning of the statute.” *Id.* at 421-24.

The same is true here, where the WCB fails to articulate any reason why a 90-day extension was “necessary.” Indeed, the *Extension Order* never even uses the words “necessary,” “need,” “required,” or any other word of similar import, let alone explain *why* – *i.e.*, provide the statutorily required “find[ing]” – that it found the extension to be “warranted.” Where an agency

fails to provide *any* reason for its decision, that cannot, by definition, constitute *reasoned* decision-making. *See, e.g., Motor Vehicle Mfgs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must “cogently explain why it has exercised its discretion in a given manner”).

For the Commission to affirm of the Bureau’s Order, there must be an adequate explanation and rationale to support its position, linking the facts at issue and the result reached. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In evaluating the explanation, it is necessary to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Bowan Transp., Inc. v. Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

The *Extension Order* fails to meet these requirements. Its five paragraphs merely relay the procedural history of Core’s petition, without any explanation as to why it was “necessary” to grant an extension for deciding the Petition. Other than the vapid “substantial questions” catch-phrase, the *Extension Order* does not provide any explanation of why the nature or substance of Core’s Petition makes it necessary to take additional time for the Commission to reach its conclusions. Core should not be left to surmise why such an extension is necessary. *See Recinos de Leon v. Gonzales*, 400 F.3d 1185 (9<sup>th</sup> Cir. 2005) (“the basis for an agency’s determination ‘must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency’s action.’”) (citation omitted).

Moreover, the statute requires a 90-day extension to be granted only if it is *necessary* “to meet the requirements of subsection (a),” not merely because the WCB or the

Commission finds it desirable to have additional time. Subsection (a) of section 10 sets forth the substantive requirements for granting forbearance as follows:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). Accordingly, unless the Commission grants an extension to meet one of the aforementioned requirements of subsection (a), the Commission does not have the statutory authority to extend the one-year deadline.

Ignoring the express directive of Congress, the *Extension Order* does not contain one letter about any of these three requirements. Absent a finding that an extension is necessary to meet the requirements of subsection (a), the Commission cannot extend the deadline, especially merely on an (unarticulated and unsupported) belief that more time is “warranted.” If Congress intended for the Commission to *always* have 15 months to consider petitions for forbearance before they were “deemed granted,” Congress would have provided just that. Instead, Congress recognized the Commission’s propensity for dilatory action and the negative impact that had on the telecommunications industry, and therefore provided ***exactly and only one year***, and not a day longer, for the Commission to rule on a petition before it would be deemed granted by operation of law, and required “the Commission” to make an explicit finding that it was “necessary to meet the requirements” of section 10(a) to avail itself of an additional 90 days. Here, neither the Commission nor the WCB did that.

#### **IV. PRAYER FOR RELIEF**

For the reasons set forth above, Core respectfully requests that the Commission overturn the Order and find that: (i) the Bureau may not act on delegated authority to extend the section 10 twelve-month statutory deadline for action upon Core's Petition; or, alternatively, (ii) to the extent the Bureau does possess the requisite authority to extend the section 10 twelve-month deadline, find that the Bureau failed to provide a reasoned explication of why the 90-day extension was "necessary" in this case, as required by section 10(c).

In either case, the Commission should either issue an order: (i) resolving the Core Petition within one the one-year statutory deadline, as required by section 10; or alternatively (ii) setting forth a reasoned explanation as to why an extension of the twelve-month statutory deadline to act up on the Core Petition is "necessary." The Commission should also provide such other relief that the Commission deems appropriate.

Respectfully submitted,

/s/

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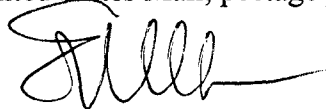
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March 28, 2007

WCSR 3577625v1

## CERTIFICATE OF SERVICE

I, Edilma M. Carr, do hereby certify that I have caused the foregoing "Application for Review" to be: 1) filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 06-100; 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the following service list.



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March 28, 2007

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